

8-17-2012

## State v. Costin Appellant's Reply Brief Dckt. 38856

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APR 17 2014

IN THE SUPREME COURT OF THE STATE OF IDAHO

|                        |   |             |
|------------------------|---|-------------|
| STATE OF IDAHO,        | ) |             |
|                        | ) |             |
| Plaintiff-Respondent,  | ) | NO. 38856   |
|                        | ) |             |
| v.                     | ) |             |
|                        | ) |             |
| ADAM ARCHIE R. COSTIN, | ) | REPLY BRIEF |
|                        | ) |             |
| Defendant-Appellant.   | ) |             |

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REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF KOOTENAI

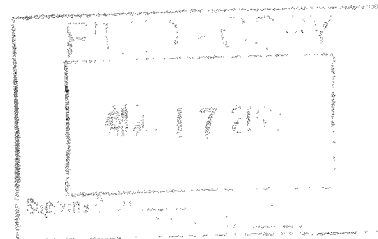
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## TABLE OF CONTENTS

|                                                                                                                                                                         | <u>PAGE</u> |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| TABLE OF AUTHORITIES .....                                                                                                                                              | ii          |
| STATEMENT OF THE CASE .....                                                                                                                                             | 1           |
| Nature of the Case.....                                                                                                                                                 | 1           |
| Statement of the Facts and<br>Course of Proceedings .....                                                                                                               | 2           |
| ISSUES PRESENTED ON APPEAL .....                                                                                                                                        | 3           |
| ARGUMENT .....                                                                                                                                                          | 4           |
| The Idaho Supreme Court Denied Mr. Costin Due Process<br>And Equal Protection When It Denied His Motion To<br>Augment The Record With The Requested Transcript.....     | 4           |
| A. Introduction .....                                                                                                                                                   | 4           |
| B. The Idaho Supreme Court Denied Mr. Costin Due Process<br>And Equal Protection When It Denied His Motion To<br>Augment The Record With The Requested Transcript ..... | 5           |
| CONCLUSION.....                                                                                                                                                         | 13          |
| CERTIFICATE OF MAILING .....                                                                                                                                            | 14          |

## TABLE OF AUTHORITIES

### Cases

|                                                                                    |       |
|------------------------------------------------------------------------------------|-------|
| <i>Downing v. State</i> , 136 Idaho 367 (Ct. App. 2001) .....                      | 6     |
| <i>Draper v. Washington</i> , 372 U.S. 487 (1963).....                             | 9     |
| <i>Mayer v. City of Chicago</i> , 404 U.S. 189 (1971) .....                        | 9, 10 |
| <i>State v. Burdett</i> , 134 Idaho 271 (2000).....                                | 7     |
| <i>State v. Flores</i> , 131 Idaho 285, 286 (Ct. App. 1998) .....                  | 11    |
| <i>State v. Gibson</i> , 106 Idaho 49 (Ct. App. 1984).....                         | 6     |
| <i>State v. Hanington</i> 148 Idaho 26 (Ct. App. 2009) .....                       | 8, 11 |
| <i>State v. Morgan</i> , Docket No 39057, 2012 Opinion No. 38 (Ct. App. 2012)..... | 8     |
| <i>State v. Nield</i> , 106 Idaho 665 (1984) .....                                 | 12    |
| <i>State v. Rundle</i> , 107 Idaho 936 (Ct. App. 1984) .....                       | 7     |
| <i>State v. Sivak</i> , 105 Idaho 900 (1983) .....                                 | 6     |
| <i>State v. Wallace</i> , 98 Idaho 318 (1977) .....                                | 6     |
| <i>State v. Warren</i> , 123 Idaho 20 (Ct. App. 1992).....                         | 7     |
| <i>State v. Wright</i> , 114 Idaho 451 (Ct. App. 1988) .....                       | 7     |

## STATEMENT OF THE CASE

### Nature of the Case

In his Appellant's Brief, Mr. Costin argued that the Idaho Supreme Court denied him due process and equal protection when it denied his Motion to Augment the record with a transcript. Mr. Costin argues that the requested transcript is necessary for his appeal because the district court could utilize its own memory of the prior proceedings when it decided to revoke Mr. Costin's probation. Mr. Costin also argued that the district court abused its discretion when it revoked his probation and denied his I.C.R. 35 motion requesting leniency.

In response, the State argues that the requested transcript cannot be added to the appellate record because it did not exist prior to the probation violation disposition hearing and, therefore, the district court did not consider it when it revoked probation. The State also argues that the requested transcript is not relevant to the issues on appeal because Mr. Costin cannot prove that the district court relied on the information discussed at that hearing when it revoked Mr. Costin's probation.

This brief is necessary to address the State's characterization of the requested transcript as new evidence. Mr. Costin argues that the requested transcript is not new evidence because a district court can rely on its own memory of the prior proceedings when it considers whether to reduce a sentence. Since Idaho appellate courts conduct an independent review of the record when determining whether a district court abused its discretion in regard to a sentencing/probation determination, what the district court actually considered is irrelevant. The only questions are: whether the information at

issue was before the district court, and whether that information is relevant to the issues on appeal.

#### Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Costin's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

## ISSUES

1. Did the Idaho Supreme Court deny Mr. Costin due process and equal protection when it denied his Motion to Augment with the requested transcript?
2. Did the district court abuse its discretion when it revoked probation and executed the underlying sentence?<sup>1</sup>
3. Did the district court abuse its discretion when it denied Mr. Costin's Idaho Criminal Rule 35 motion for a reduction of sentence in light of his progress during incarceration?<sup>2</sup>

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<sup>1</sup> Mr. Costin is withdrawing this issue from this Court's consideration. However, Mr. Costin incorporates all of the mitigating information contained in Section II of the Appellants' Brief into Section III of the Appellant's Brief.

<sup>2</sup> Mr. Costin will rely on the briefing contained in the Appellant's Brief, which addresses this issue.

## ARGUMENT

### The Idaho Supreme Court Denied Mr. Costin Due Process And Equal Protection When It Denied His Motion To Augment The Record With The Requested Transcript

#### A. Introduction

In Idaho, district courts consider a broad range of information when making sentencing decisions. Due to this broad range of information, Idaho appellate courts have scrupulously required defendants to provide an extensive appellate record because they conduct an independent review of the entire record before the district court when determining whether an abuse of discretion occurred in regard to a sentencing/probation determination. In other words, the question on appeal generally does not focus on how or what the district court actually considered. Instead, the central question is whether the record before the court supports its sentencing/probation determination.

Since Idaho appellate courts need to have all of the relevant information that was before the district court to conduct this analysis, they will presume that any missing information supports the trial court's determination and refuse to rule on the merits of the issue. In some instances, appeals have been dismissed due to the appellants' failure to provide transcripts of hearings which occurred years before the disposition of the issue on appeal.

In this case, Mr. Costin argued that the Idaho Supreme Court denied him due process and equal protection when he requested a transcript necessary to provide an adequate record for appeal. In response, the State argues that the requested transcript is not necessary because the district court did not have that transcript when it made the



determination to deny his I.C.R. 35 motion. The State goes as far as arguing that the requested transcript would constitute new information on appeal, which cannot be considered by an appellate court. The State's position, if taken to its logical conclusion, would limit the information a district court could consider because a transcript of a prior hearing would have to be created before a district court could consider information from that hearing in regard to a subsequent proceeding. For example, without a transcript of a defendant's original sentencing hearing, a district court could not consider information from that sentencing hearing when determining whether to grant or deny an I.C.R. 35 motion.

B. The Idaho Supreme Court Denied Mr. Costin Due Process And Equal Protection When It Denied His Motion To Augment The Record With The Requested Transcript

An indigent defendant can require the State to pay for an appellate record including verbatim transcripts of the relevant trial proceedings. However, the State does not necessarily have to provide indigent defendants with everything they request. In order to meet the constitutional mandates of due process and equal protection, the State must provide indigent defendants with a sufficient appellate record to enable a merit-based review of the issues raised on appeal. In this case, the Idaho Supreme Court denied Mr. Costin's requests for a transcript of the evidentiary hearing held on August 17, 2009.<sup>3</sup> That denial prevents Mr. Costin from adequately addressing the issue raised on appeal. Further, it could be presumed that the information contained in the missing transcript supports the district court's decision to deny his I.C.R. 35 motion.

In response to this position, the State argues that the requested transcript pertains to issues over which this Court has no jurisdiction and cannot be considered on appeal because the “as-yet unprepared transcript was never presented to the district court in relation to the probation revocation and Rule 35 proceedings at issue in this case it was never part of the record before the district court and is not properly considered for the first time on appeal.” (Respondent’s Brief, pp7-8.) Contrary to the State’s position, the question of whether the transcript of the requested proceeding was before the district court at the time of its disposition of the I.C.R. 35 motion is not relevant in deciding whether the transcript is relevant to the issues on appeal because in reaching a sentencing determination, a district court is not limited to considering only that information offered at the proceeding from which the appeal is filed. Rather, a court is entitled to utilize knowledge gained from its own official position and observations. *Downing v. State*, 136 Idaho 367, 373-74 (Ct. App. 2001); *see also State v. Sivak*, 105 Idaho 900, 907 (1983) (recognizing that the findings of the trial judge in sentencing are based, in part, upon what the court heard during the trial); *State v. Wallace*, 98 Idaho 318 (1977) (recognizing that the court could rely upon “the number of certain types of criminal transactions that [the judge] has observed in the courts within his judicial district and the quantity of drugs therein involved”); *State v. Gibson*, 106 Idaho 491 (Ct. App. 1984) (approving sentencing court’s reliance upon evidence presented at the preliminary hearing from a previously dismissed case because “the judge hardly could be expected to disregard what he already knew about Gibson from the other case”).

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<sup>3</sup> The date and nature of the hearing at issue was incorrectly stated in the Appellant’s Brief. (Appellant’s Brief, p.5.) The State accurately points out that this hearing was an evidentiary hearing, which was held on August 17, 2009. (Respondent’s Brief, p.5.)

Thus, whether the prior hearings were transcribed or not is irrelevant, because the district court could rely upon the information it already knew from presiding over the prior hearings when it denied Mr. Costin's I.C.R. 35 motion.

Additionally, the State's position is unworkable because all transcripts, except a transcript of the hearing from which an appeal is taken, would be deemed new information. This is inconsistent with the holding from *State v. Burdett*, 134 Idaho 271, 276 (Ct. App. 2000), where the district court examined the defendant about his guilty plea during the change of plea hearing. Since the defendant in *Burdett* failed to provide a transcript of that hearing on appeal, the Court of Appeals presumed that something occurred in that hearing which supported the district court's sentencing decision. *Id.*

If the State's argument is taken to its logical conclusion, a transcript of a defendant's original sentencing hearing would be new information in instances where an appeal is filed from an I.C.R. 35 motion. Further, if that is new information, a district court should not, absent a transcript, consider what happened at sentencing when evaluating an I.C.R. 35 motion. However, in *State v. Wright*, 114 Idaho 451, 452-453 (Ct. App. 1988), the Idaho Court of Appeals refused to address the merits of an appeal from the denial of an I.C.R. 35 motion because the appellant failed to provide the PSI and a transcript of the sentencing hearing in the appellate record. See also *State v. Rundle*, 107 Idaho 936 (Ct. App. 1984).

The State's argument is also refuted by *State v. Warren*, 123 Idaho 20 (Ct. App. 1992). In that case, Mr. Warren was convicted of aggravated battery and placed on probation. *Id.* at 21. Mr. Warren's probation was then revoked and the district court retained jurisdiction for 180 days. *Id.* After completing the period of

retained jurisdiction, Mr. Warren was placed on probation. *Id.* Mr. Warren's probation was then revoked. *Id.* Mr. Warren then appealed and alleged that his sentence was excessive. *Id.* On appeal, Mr. Warren argued that his probation violation was trivial. *Id.* The Court of Appeals addressed that argument stating "Warren incorrectly points to the nature of the probation violation by arguing that his violation was trivial. This Court must look at the nature of the original criminal offense, in this case aggravated battery where Warren bit off his victim's ear." *Id.*<sup>4</sup> However, the Court of Appeals did not address the merits of his sentencing claim because he failed to provide the original PSI and a transcript of the original sentencing hearing. *Id.* Even though the district court's original sentence was not directly being appealed, and happened years before the decision at issue, the Idaho Court of Appeals held that the transcript was necessary to address Mr. Warren's claims of error. Moreover, there was no indication that the district court referenced the original sentencing hearing at the probation violation disposition hearing. It appears that the Court of Appeals assumed that the original sentencing hearing would address the nature of the original offense. In light of the Court of Appeals' holding in *Warren*, had Mr. Costin failed to request the transcript, the State could have argued that his appeal should have been dismissed for failure to provide an adequate appellate record.<sup>5</sup>

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<sup>4</sup> This is an example of the Idaho Court of Appeals conducting an independent review of the record.

<sup>5</sup> The Idaho Court of Appeals has recently issued an opinion in *State v. Morgan*, Docket No 39057, 2012 Opinion No. 38 (Ct. App. 2012) (not yet final), which addressed the foregoing argument. In *Morgan*, the Court of Appeals clarified the scope of review articulated in *State v. Hanington* 148 Idaho 26 (Ct. App. 2009). Specifically it held:

In reviewing the propriety of a probation revocation, we will not arbitrarily confine ourselves to only those facts which arise after sentencing to the

According to the State, Mr. Costin argued, “with no citation whatsoever,” due process and equal protection require the State to “provide him (and all indigent defendants) with whatever appellate record he desires unless the *state* proves ‘that some or all of the requested materials are unnecessary or frivolous.’” (Respondent’s Brief, p.10 (quoting Appellant’s Brief, p.7) (emphasis in original)). Mr. Costin’s burden shifting argument was based on *Mayer v. City of Chicago*, 404 U.S. 189, 195 (1971), where the United States Supreme Court first held that the State does not need to “waste its funds by providing what is unnecessary for adequate appellate review.” However, the Court went on to hold that:

We emphasize, however, that the State must provide a full verbatim record where that is necessary to assure the indigent as effective an appeal as would be available to the defendant with resources to pay his own way. Moreover, where the grounds of appeal, as in this case, make out a colorable need for a complete transcript, the burden is on the State to show that only a portion of the transcript or an ‘alternative’ will suffice for an effective appeal on those grounds. This rationale underlies our statement in *Draper*,<sup>6</sup> that:

‘(T)he State could have endeavored to show that a narrative statement or only a portion of the transcript would be adequate and available for appellate consideration of petitioners’ contentions. The trial judge would have complied with \* \* \* the constitutional mandate \* \* \* in limiting the grant accordingly on the basis of such a showing by the State.’<sup>7</sup>

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time of the revocation of probation. However, that does not mean that *all* proceedings in the trial court up to and including sentencing are germane. The focus of the inquiry is the conduct underlying the trial court’s decision to revoke probation. Thus, this Court will consider the elements of the record before the trial court relevant to the revocation of probation issues which are properly made part of the record on appeal.

*Morgan*, at 4 (original emphasis). However, the *Morgan* opinion is not a final opinion and Mr. Costin is raising a sentencing claim in this appeal.

<sup>6</sup> *Draper v. Washington*, 372 U.S. 487, 498 (1963).

<sup>7</sup> While addressing on the State’s argument the Court also noted that:

*Id.* (footnote omitted). If it is apparent on the record that there is a colorable need for the requested transcripts, it is the State's burden to prove that the requested transcripts are irrelevant. Therefore, Mr. Costin's burden shifting position is supported by the case law referenced by the State.

Based on the *Mayer* opinion, the State also argues that Mr. Costin has failed to make the requisite showing that the requested transcripts are relevant to the issues on appeal. (Respondent's Brief, pp.7-13.) Specifically, the State cites to the *Mayer* opinion for the proposition "that, absent a showing that evidence was presented at prior hearings *and* that the district court relied on such evidence in reaching its decision to revoke probation, an appellant is not entitled to a transcription at public expense . . . ." (Respondent's Brief, p.9 (original emphasis)). The State then argues that Mr. Costin has failed to show that the district court relied on anything that occurred during the hearings at issue when the district court revoked Mr. Costin's probation. (Respondent's Brief, pp.9-10.) The State's position is flawed because it engrafts its definition of relevance into the holding from *Mayer* and then confuses the applicable standard or review. First, *Mayer* only requires that the State provide an indigent defendant access to transcripts if they are generally relevant to an issue on appeal. That opinion does not

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[This analysis does not include a] balance between the needs of the accused and the interests of society; its principle is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way. The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed. The State's fiscal interest is, therefore, irrelevant.

*Mayer*, 404 U.S. at 196-197.

attempt to define relevance. It never states that a transcript is relevant if evidence was adduced at a hearing or if the district court relied on the hearing.

More importantly, the State's position disregards the applicable standard of review. When a sentencing/probation determination is at issue on appeal, the appellate court conducts its own independent review of the record, which is not confined to the information considered by the district court. *State v. Flores*, 131 Idaho 285, 286 (Ct. App. 1998) ("Where an appellant asserts that the sentencing court imposed an excessively harsh sentence, we conduct an independent review of the record and focus upon the nature of the offense and the character of the offender."); *State v. Hanington*, 148 Idaho 26, 28 (Ct. App. 2009) ("When we review a sentence that is ordered into execution following a period of probation, we will examine the *entire record* encompassing events before and after the original judgment. We base our review upon the facts existing when the sentence was imposed as well as events occurring between the original sentencing and the revocation of probation." (emphasis added)).<sup>8</sup> In determining whether information is relevant to an appellate court during this review the only question is whether the information was before the district court,<sup>9</sup> not whether the district court actually relied on that information. This is plenary review. Therefore, the State's assertion that Mr. Costin must prove that the district court relied on information

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<sup>8</sup> The *Hanington* opinion was directly addressed by the Court of Appeals in *Morgan*, *supra*, n.5.

<sup>9</sup> The information must also relate to a sentencing concern such the nature of the offense or the defendant's background.

which was either discussed or presented at the hearings in question is misplaced because it disregards the applicable standard of review.<sup>10</sup>

Further, the State's position will render appellate review on various issues meaningless because district courts in Idaho are not required to state their sentencing rationale. *State v. Nield*, 106 Idaho 665, 666 (1984). If the State's argument is accepted, an appellate court would not be able to review a sentence/probation determination under these circumstances because the court would not know what information the district court considered. This position is at odds with a system which purports to provide meaningful sentencing review.

In sum, Idaho courts consider a very broad range of information when making sentencing decisions. Due to that broad range of discretion, an appellant must provide an extensive appellate record in order to challenge all forms of sentencing/probation determinations on appeal because Idaho appellate courts will presume any missing information will support the district court's decision. It generally does not matter what the district court actually considered, if the information was in the record and is relevant to an issue on appeal, an appellate court will review that information. In light of the foregoing, the Idaho Supreme Court denied Mr. Costin due process and equal protection when it denied him transcripts of the hearings he will need to overcome this presumption.

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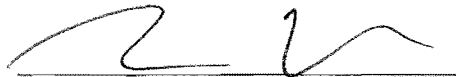
<sup>10</sup> Mr. Costin asserts that the *Morgan* opinion, *supra*, n.4, is also at odds with the applicable standard of review.



### CONCLUSION

Appellate counsel respectfully requests access to the requested transcript and the opportunity to provide any necessary supplemental briefing raising issues which arise as a result of that review. In the event this request is denied, Mr. Costin respectfully requests that this Court reduce the indeterminate portions of his sentence.

DATED this 17<sup>th</sup> day of August, 2012.

A handwritten signature in black ink, appearing to read 'Shawn F. Wilkerson', written over a horizontal line.

SHAWN F. WILKERSON  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

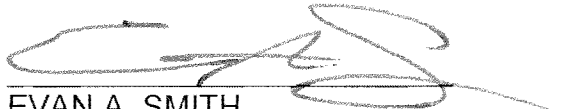
I HEREBY CERTIFY that on this 17<sup>th</sup> day of August, 2012, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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DISTRICT COURT JUDGE  
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